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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 852 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR. JUSTICE ANANT S DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

RAJKAMAL @ KAMLI JATSINGH NAT

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 852 of 2000

MR YATIN SONI for Appellant

Mr. N.D. Gohil, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE R.P.DHOLAKIA
and
HON'BLE MR. JUSTICE ANANT S DAVE

Date of decision: 22/02/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.P.DHOLAKIA)

1. Rajkamal @ Kamli Jatsingh Nat, original accused No.1 in Sessions Case No.2 of 1986, has filed the present appeal under Section 374 of the Code of Criminal

Procedure, challenging the judgment and order dated 3rd July 2000, passed by the learned Sessions Judge, Valsad, at Navsari, in Sessions Case No.2 of 1986, convicting the appellant-accused No.1 for the offences punishable under Sections 397, 458 and 460 of the Indian Penal Code, and sentencing to undergo R.I. for ten years and fine of Rs.5,000/- in default, R.I. for two years for the offence punishable under Section 397 of the Indian Penal Code; R.I.for five years and fine of Rs.5,000/- in default R.I. for one year for the offence punishable under Section 458 of the Indian Penal Code, and R.I. for three years and fine of Rs.2,000/- in default, R.I. for six months for the offence punishable under Section 460 of the Indian Penal Code. All the sentences are ordered to run concurrently.

2. Before proceeding with the matter, it is required to be noted that there were three accused in Sessions Case No.2 of 1986 and, after the trial, the learned Sessions Judge, Valsad, at Navsari, by the judgment and order dated 3rd July 2000, convicted the accused Nos. 1 and 2, and acquitted the accused No.3, Surajram Nat. However, against the judgment and order dated 3rd July 2000, only the present appellant, Rajkamal @ Kamli Jatsingh Nat, who is original accused No.1 in Sessions Case No.2 of 1986, has filed the present appeal, whereas, the accused No.2, Suresh @ Dinga Petisinh Nat, has not preferred any appeal against his conviction and sentence. The State has accepted the judgment and order dated 3rd July 2000, passed by the learned Sessions Judge, Valsad, at Navsari, in Sessions Case No.2 of 1986, in toto.

3. With this background, the following facts, in brief, are required to be noted.

3.1 It is the prosecution case that the complainant, Vibhaben, is a resident of village Bhilad, Taluka: Umargam. On 2nd October 1984, at midnight, some unknown persons armed with sticks entered her home by force, attacked her father, and stolen golden ornaments. When she raised shouts, they ran away with the booty. One Pragjibhai Gopalbhai had conveyed the message to the police station by telephone and, thereafter, the police reached the place of incident. It is described by the complainant in the complaint that all the accused persons were wearing khaki half pants and khaki shirts. The accused persons were also wearing bukanis. PSI, Mr. Ranvatsinh Solanki registered the complaint and sent the complaint to the police station at Umargam. Further investigation was carried out by Mr. Zala on 3.10.1984. Panchanama was drawn on 3.10.1984 and the muddamal was

also recovered. On 2.8.1985, C.P.I. Mr. Dabhi, of Navsari, arrested all the accused and they had shown their willingness to take the police to the place of incident, where a panchanama was drawn. On 6.9.1985, the investigation was handed over to the C.I.D. Crime. On 21.9.1985, transfer warrant of three accused was received from the Court at Umargam. On 23.9.1985, accused were produced before the learned Chief Judicial Magistrate Court, Navsari. On 3.10.1985, a letter was written by PSI Chowdhary to the Executive Magistrate, Umargam, for the purpose of conducting T.I.Parade. At the end of the investigation, chargesheet was filed against the accused for the offences punishable under Sections 458, 460, 395, 396, 397 read with Section 75 of the Indian Penal Code. The matter was transferred to the Court of the learned Sessions Judge, Valsad, at Navsari, where the charge was framed against the accused. As the accused pleaded not guilty to the charge and claimed to be tried, the prosecution led oral evidence and produced documentary evidence. On submissions of closing purshis by the prosecution, the learned Sessions Judge, Valsad, at Navsari, recorded further statement of the accused under Section 313 of the Code of Criminal Procedure. After hearing the learned advocates appearing for the respective parties, the accused were convicted as aforesaid.

4. Heard learned counsel, Mr. Yatin Soni, appearing for the appellant, and learned Additional Public Prosecutor, Mr.N.D. Gohil, for the State.

5. The learned counsel, Mr. Yatin Soni, appearing for the appellant, has submitted that, at the time of the incident, the accused persons were having bukani/mask on their faces and, therefore, it is impossible for the witnesses to identify the accused persons who had tied bukani on their faces. He has further argued that the incident in question was alleged to have taken place in the mid-night and that too also in the month of October, and no description of the accused has been given either by the complainant or by any other witnesses, who were present at the time of the incident in the house. He has further argued that the appellant-accused was arrested after a period of one year and the T.I. Parade took place after lapse of 37 days from the date of his arrest that is 24.9.1985 and there was an opportunity to the witnesses to see the accused before the T.I.Parade was held. In short, it has been argued by him that the T.I. Parade is concocted one and is not trustworthy and, in any circumstances, has been held after the opportunity having been given to the witnesses to see the accused

and, therefore, the trial court ought not to have placed reliance on the abovereferred evidence. It has been further argued by him that, except the evidence of the T.I. Parade, there is no evidence, worth the name, to connect the present appellant with the crime in question. He took us to the judgment of the trial court, more particularly, paragraphs 27 to 51, wherein, the learned Sessions Judge has discussed the evidence of the case and the law in detail on the point of evidentiary value of the T.I. Parade. He also took us to paragraphs 51 onwards, which relate to other circumstantial evidence.

5.1 So far as other evidence is concerned, after reading paragraph 54 onwards, it has been argued by the learned counsel, Mr. Soni, that, before arresting the accused in connection with crime in question, the abovereferred recovery panchanama had taken place and there is no evidence on record to show that the muddamal gold which was alleged to have been seized from the gold-smiths of Ahmedabad and Godhra is belonging to the family members of the complainant, because, it was in moulded condition. It has been argued by him that even the prosecution witnesses have not supported the say of the prosecution to that effect and, therefore, according to him, the abovereferred evidence is not a strong circumstantial evidence, which connects the accused with the crime in question and when there is a lacuna in the circumstantial evidence and the chain of circumstantial evidence is not complete, the Court ought not to have relied upon the same for convicting the appellant.

6. The learned Additional Public Prosecutor, Mr.N.D. Gohil, for the State, has supported the judgment and order of the learned Sessions Judge, and took us to the relevant evidence of P.W.1, Vibhaben, Exh.12, and P.W.2, Naynaben, Exh.13, and also the evidence of two panchas of T.I. Parade, the Magistrate and the police personnel. It has been further argued that there are ample evidence on record connecting the appellant with the crime in question. It is further argued that the T.I. Parade is trust-worthy and has been supported by the panchas as well as the Executive Magistrate, complainant, Vibhaben, and Naynaben and police personnel and there is no reason to disbelieve the abovereferred witnesses. It has been further argued that since there were some minor contradictions, the same has been rightly ignored by the trial court at the time of appreciating the evidence on record. It has been argued by the learned APP that the circumstantial evidence on record had strengthened the case of the prosecution which has been proved by the prosecution by way of T.I. Parade and other evidence

and, therefore, it cannot be ignored by the trial court as well by this Court. It has also been argued that, in the facts and circumstances of the case and keeping in mind the seriousness of the incident which had taken place in the mid-night and since the impugned judgment being a well reasoned judgment, the conviction recorded and sentence awarded by the learned Sessions Judge, Valsad, at Navsari, are just and proper and do not require any interference by this Court.

7. Before we proceed with the matter, it is required to be referred to the case-law on the point of T.I. Parade, which was dealt with by the trial court in paragraph 34 of the judgment. In the case of Bijoykumar Mahapatra and others vs. State of Orissa, reported in 1982 Cri. L.J. p.2162, it has been observed as under:

> "The purpose of test identification parade seems to be to test and strengthen the trust worthiness of the evidence given in the Court. As a safe rule of prudence, it is considered necessary to generally look for corroboration of the sworn testimony of a witness in the Court as regards the identity of the accused who is a stranger to him in the form of an earlier test identification proceeding. There may, however, be exceptions to this general rule, when the Court is impressed by a particular witness on whose testimony it can safely rely without such or other corroboration. Keeping in view the purpose of identification parades, the Magistrates holding then are expected to take all possible precautions to eliminate suspicions of unfairness and to reduce the chances of testimonial error. The power to identify memory of the person identifying and each case depends on its own facts, but, there are two factors which seem to be of basic importance in the evaluation of identification evidence. The persons required to identify an accused should have had no opportunity of seeing him after the commission of the crime and before the identification and no mistakes are made by them or the mistakes made are negligible."

In the case of Sampat Tatyada Shinde vs. State of Maharashtra, reported in AIR 1974 Supreme Court 791, the Supreme Court has propounded the evidentiary value of identification parade. In the case of Malkhansingh and others vs. State of Madhya Pradesh, reported in JT 2003 (5) SC 323, the Supreme Court discussed its earlier judgments on the point of admissibility and valuation of the test identification parade in paragraph 7, and, in paragraph 16, it has been held as under:

> "16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine."

8. Keeping in mind the principles laid down by the Orissa High Court and the Supreme Court on the point of admissibility and valuation of the test identification parade, we have examined the evidence on record, more particularly the evidence of P.W.1, Vibhaben, Exh.12, First Information Report, Exh.42 etc. From the evidence on record, it has been established that all the accused who had entered into the house at mid-night and who were outside the house, had tied their faces with bukani/mask, and the same fact had been narrated by the complainant, Vibhaben, in the First Information Report Exh.42, and the same has been deposed by Vibhaben in her evidence. Along with that, there are other evidence on record, namely, P.W.20, Mambubhai Bababhai Jadav, Exh.50, who has also admitted the same by stating that the said fact has been narrated by Vibhaben to him. In the same way, P.W.3, Pragjibhai Gopalbhai, Exh.14, has also supported the same. Therefore, it has been established beyond reasonable doubt that all the accused, including the appellant, tied their faces with bukani and their faces remained covered during the incident in question and, therefore, one thing is certain that P.W.1, Vibhaben, and P.W.2, Nayanaben, had no opportunity to see their faces. Similarly, even the First Information Report is also silent regarding description of the accused, namely, their age, appearance etc. The evidence on record shows that the incident in question is alleged to have taken place on 2nd October 1984 in the mid-night, and the present appellant and other accused were arrested after a period of one year from the date of incident. Not only that, prior to that, they have been arrested in connection with other incident and their names have been disclosed in the crime in question on 26th August 1985 and, therefore, by way of warrant, they have been taken into custody in connection with the present offence. The test identification parade was held on 3rd October 1985 after a period of 37 days from the date of their involvement. The evidence on record further shows that, prior thereto, the witness, namely, P.W.1, Vibhaben, had opportunity to see the appellant-accused. It is admitted by the complainant, P.W.1, Vibhaben, that she had an

opportunity to see the accused before the test identification parade was held. Even the Court had also asked certain questions to that effect to P.W.1, Vibhaben, and, after evaluation of the whole evidence of P.W.1, Vibhaben, we come to the conclusion that she had an opportunity to see the appellant-accused prior to test identification parade and, immediately, she was able to identify the appellant in the test identification parade and, therefore, the test identification parade has become a weak piece of evidence in the absence of other corroborative evidence on record. The evidence of P.W.2, Naynaben, has also become doubtful in view of admission on the part of P.W.1, Vibhaben, that she came there along with her sisters, Rima and Seems and, therefore, the prosecution has failed to establish that P.W.2, Naynaben, was there at the time of test identification parade near the Mamlatdar's office. Over and above, there is admission on the part of the Executive Mamlatdar, P.W.12, Bhojabhai Bhagwanji Tandel, Exh.34, in his cross examination that there are discrepancies in the test identification parade. Not only that, even the evidence of panchas is also not satisfactory one. In short, the evidence of test identification parade is not trust-worthy for the following reasons:

(i) The test identification parade was held after lapse of period of 37 days from the date of arrest of the accused. Prior to that, the appellant-accused was taken to the house of the complainant, Vibhaben, and a panchanama to that effect was prepared. Not only that, before the test identification parade, P.W.1, Vibhaben and others had an opportunity to see the present appellant-accused and, thereafter, the test identification parade was held and there are evidence on record that all the accused were having bukani on their faces till they left the place of incident.

(ii) There is no description of the accused in the first information report or in the statement of any other the important witnesses.

(iii) There are discrepancies in the procedure adopted by the Mamlatdar in drawing the panchanama.

The cumulative effect of the above discussion is that the panchanama is not trust-worthy and the appellant-accused cannot be convicted only on the basis of sole evidence of test identification parade. The other circumstantial evidence, according to us, is weak one and does not complete the chain of events. The prosecution has failed to prove that the muddamal gold or ornaments had been seized at the instance of the appellant-accused from the two gold-smiths from Ahmedabad and Godhra and, therefore, it cannot be said that the muddamal has been recovered

from the accused. On overall appreciation of evidence, in our view, the value of identification is very low and it would be very unsafe to rely on it solely for upholding the conviction. It is a rule of prudence that, where the incident took place at the mid-night and when no description of the accused was given in the first information report by the complainant, benefit of doubt should be given to the accused. Furthermore, the delay of 37 days in holding the T.I. Parade was not satisfactorily explained, and the possibility of the witness seeing the accused before the parade having been not ruled out, rendered the evidence of identification unacceptable and, on this ground also, the appellant-accused is entitled to the benefit of doubt.

9. In the result, the appeal is allowed. The conviction recorded and sentence awarded by the learned Sessions Judge, Valsad, at Navsari, by his judgment and order dated 3rd July 2000, passed in Sessions Case No.2 of 1986, are quashed and set aside qua the appellant, Rajkamal @ Kamli Jatsingh Nat, who is the original accused No.1 in Sessions Case No.2 of 1986. The appellant, Rajkamal @ Kamli Jatsingh Nat, the original accused No.1 in Sessions Case No.2 of 1986, is ordered to be set at liberty forthwith, if he is not required to be kept in custody in connection with any other case."

February 22, 2005 (R.P. Dholakia, J.)

(Anant S. Dave, J.)

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